

DISCHARGE OF LATENT SURETIES ON NEGOTIABLE INSTRUMENTS BECAUSE OF RELEASE OR EXTENSION OF TIME*

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A FAMILIAR rule of suretyship discharges a surety from his obligation if the creditor effectively releases or extends the time of payment to the principal debtor without the surety's knowledge or consent. The rule permitting discharge is also applied to accommodation drawers and indorsers on commercial paper and to accommodation makers and acceptors who patently describe their accommodation status on the instrument. This Article addresses itself to the advisability of applying the rule of discharge in favor of latent accommodation parties—those who sign instruments as makers or acceptors without adding words describing their accommodation status.

While the relation of an accommodation party to a holder of commercial paper is closely analogous to that of an ordinary surety and creditor, yet "from the very nature of the transaction contemplated in using a negotiable instrument, there may be certain suretyship equities which are not applicable. The fields [of suretyship and negotiable instruments law] are not coextensive but overlapping."¹ The law of negotiable instruments is governed by a policy which favors circulability above other considerations. If the introduction into the negotiable instrument field of the rule which discharges sureties conflicts with this policy, the rule of discharge should yield and should not be applied to accommodation parties,² despite their similarity to ordinary sureties. Early cases under the Negotiable Instruments Law held that the statute had abolished the rule of discharge. Whether the common law cases which permitted accommodation parties to interpose suretyship defenses were erroneously decided and whether their effect was vitiated or modified by the Negotiable Instruments Law³ are disputed points, whose resolution is deter-

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1. Comment (1925) 38 HARV. L. REV. 954, 959, n. 30.

2. See Eaton, *On Uniformity in Judicial Decisions of Cases Arising under the Uniform Negotiable Instruments Act* (1913) 12 MICH. L. REV. 89, 90 *et seq.* See cases cited *infra* note 3.

3. Certain courts and commentators have asserted that the Act abolished or modified the rule of discharge to preserve circulability. See, *e.g.*, *Vanderford v. Farmers' & Mech. Nat. Bank*, 105 Md. 164, 66 Atl. 47 (1907); *Merchants' Nat. Bank v. Smith*, 59 Mont. 280, 196 Pac. 523 (1921); *Goodman v. Goodman*, 127 Ohio St. 223, 187 N. E. 777 (1933); *Farmers' State Bank v. Forsstrom*, 89 Ore. 97, 173 Pac. 935 (1918); Eaton, *The Negotiable Instruments Law: Its History and Its Practical Operation* (1904) 2 MICH. L. REV. 260, 280; CRAWFORD, *NEGOTIABLE INSTRUMENTS LAW ANNOTATED* (4th ed. 1916) 201.

minative as to whether or not the rule permitting discharge should today be restored by reinterpretation or amendment of the Act. The effect of this rule of ordinary suretyship on commercial paper will, of course, vary, as the holders' dealings with the parties accommodated are deemed defenses available only to patent or to all accommodation parties, and available against all or only some holders—results which depend on the particular legal theory which is applied to the parties' relationship.

If the discharge is considered as resulting from the holder's breach of his agreement to treat the accommodation party as surety by refraining from conduct that would impair a surety's rights to reimbursement and subrogation or increase his contemplated risk,⁴ the discharge will be available as a defensive plea only to patent accommodation parties; but it will be available to them against all holders who effectively release or extend time to the accommodated parties without the accommodation parties' knowledge or consent. Because of the barrier of the parol evidence rule, discharge on this theory will be unavailable to latent accommodation parties as a defense against any holder, since neither the holder's express oral agreement to treat the accommodation party as surety, nor any agreement to do so implied in fact from the holder's taking the instrument with knowledge of the accommodation, can be established by proper proof. Even less will discharge on this basis be available to a latent accommodation party as a defense against a holder who does not know of the accommodation on acquiring the instrument, even though he learns of it before he deals with the accommodated party.

If, however, the discharge is thought to result from the holder's violation of his duty to treat the accommodation party as surety—a duty imposed in good conscience upon the holder by his mere knowledge of the accommodation, quite apart from any agreement to the suretyship—the discharge will be available as a defense to latent as well as patent accommodation parties, because the existence of the holder's duty and its violation can be properly established by parol proof. Yet, because of "the very nature of the transaction contemplated in using a negotiable instrument," the availability of the discharge as a defense against some holders may, conceivably at least, depend on the time when the holder acquired knowledge of the accommodation. If the plea of discharge is regarded much as though it were a defense available against a holder only if unforeclosed by negotiation of the instrument to him without notice thereof, and if the holder's mere knowledge of the accommodation

4. The discharge of ordinary sureties was at first usually explained in terms of sheer formalism—to avoid a circuitry of actions. Later it was explained as resulting from a rescission of the surety's contract or from the creditor's impairment of the surety's rights to reimbursement and subrogation. ARANT, *SURETYSHIP AND GUARANTY* (1931) 179 *et seq.*, 284 *et seq.* Arant suggests another approach—the increase-in-contemplated-risk. *Id.* at 183 *et seq.*, 287-288.

at the time of transfer to him is regarded as defeating his position as a holder in due course free from such a "personal" defense, the discharge will be available only against a holder who knows of the accommodation when he takes the instrument; and it will be unavailable against a holder who does not learn of the accommodation until after transfer, although he learns of it before he effectively releases the accommodated party or extends time to him. The availability of the discharge as a defense, under this view of the materiality of the time of acquiring knowledge of the accommodation, would necessarily be peculiar to suretyship on negotiable commercial paper, if applicable to the question of a surety's discharge at all.

But if the discharge is thought to result from the holder's own act, coupled with knowledge of the accommodation when he acts, irrespective of whether such knowledge is acquired before or after taking the instrument, the discharge will be available to any accommodation party as a defense against the very holder-actor personally and not as a "personal" defense forecloseable by negotiation of the instrument to him without notice of it. In this view, the plea of discharge will be available to latent as well as patent accommodation parties against original or remote holders whether they can qualify as "holders in due course" by their lack of knowledge of the accommodation at transfer or can qualify as holders in due course in all respects.⁵ If allowed as a defense to this extent, the discharge, even if just when applied to latent sureties on ordinary obligations, might conceivably be improperly applied to latent accommodation makers and acceptors of negotiable commercial paper.

Each of these widely varying bases for the discharge of accommodation parties seems to have been considered by the courts at different times before the passage of the Negotiable Instruments Law. Since the Act, courts applying its various provisions seem to have been influenced by kindred concepts of the appropriate occasion for their discharge. In its application to patent accommodation parties, this suretyship defense presented no great difficulty before the statute;⁶ and the discharge of accommodation drawers and indorsers for release or extension of time to accommodated makers or acceptors is expressly provided for in Section 120(5) and (6) of the Act. The troublesome question both before and

5. It is not suggested that mere knowledge of the accommodation is enough to defeat a holder's position as holder in due course. The distinction between holders in due course in all respects other than their knowledge of the accommodation on taking the instrument and those who are holders in due course in "all respects" is used for convenience in analysis only. See notes 11, 12, 84-87, and 99-105 *infra*.

6. 2 DANIEL, NEGOTIABLE INSTRUMENTS (4th ed. 1891) §§ 1303-1306 (accommodation drawers and indorsers); *id.* at § 1332 (accommodation makers and acceptors adding "surety," or the like, to their signatures). As to these latter under the Negotiable Instruments Law, see p. 395 *infra*.

since the adoption of the Act has been whether or not to permit the discharge of latent accommodation parties.

DEVELOPMENT BEFORE THE ADOPTION OF THE
NEGOTIABLE INSTRUMENTS LAW

Although Lord Mansfield decided two cases in the Court of King's Bench which dealt with the discharge of latent sureties,⁷ neither of them sheds any light on the precise reason for a latent accommodation party's discharge. In 1809, after Lord Mansfield's death, the issue was raised at *nisi prius* in *Laxton v. Peat*,⁸ an action by the indorsee of a bill of exchange against the latent accommodation acceptor. In holding the plea of discharge because of the indorsee's extension of time to the accommodated drawer to be a good defense to the action, Lord Ellenborough emphasized the fact that the indorsee had knowledge of the acceptor's accommodation character when he took the bill "so that he was not deceived thereby." Whether this emphasis should be taken to mean that the indorsee had discharged the acceptor by his breach of an implied in fact agreement to treat the acceptor as surety, or that a defense forecloseable only by negotiation of the bill without notice thereof had been successfully interposed, does not clearly appear from the report.

Whatever its basis, even the result in *Laxton v. Peat* was soon doubted;⁹ and, on the issue being presented in 1813 to the Court of Common Pleas in *Fentum v. Pocock*,¹⁰ Sir James Mansfield, C. J., overruled *Laxton v. Peat* to hold the latent accommodation acceptor's plea of discharge, because of the plaintiff indorsee's extension of time to the accommodated drawer, ineffective as a defense to the action. Although he recognized that the two cases were factually distinguishable, since in the one before him the indorsee had not known of the acceptor's accommodation character when he took the bill but had learned of it before he extended time to the accommodated drawer, the Chief Justice refused to make any legal distinction between them.

If the basis for the surety's discharge is the successful interposition of a "personal" defense "available to prior parties among themselves," the cases were significantly distinguishable in that such a defense had not been foreclosed by negotiation without knowledge of its existence or source in *Laxton v. Peat* and had been so foreclosed in *Fentum v. Pocock*. But the mere fact of accommodation itself is not a "personal"

7. *Dingwall v. Dunster*, 1 Dougl. 247 (K. B. 1779); *Ellis v. Galindo*, 1 Dougl. 250, note (K. B. 1783).

8. 2 Camp. 185 (K. B. 1809).

9. *Kerrison v. Cooke*, 3 Camp. 362 (C. P. 1813); *Raggett v. Axmore*, 4 Taunt. 730 (Ex. Ch. 1813).

10. 5 Taunt. 192 (Ex. Ch. 1813), followed as controlling in *Carstairs v. Rolleston*, 5 Taunt. 551. (Ex. Ch. 1814).

defense, even against an original payee who is a holder for value;¹¹ nor is it alone the source of such a defense. Since the discharge of an accommodation party does not arise out of the holder's mere knowledge of the accommodation unless followed by his own act of releasing or extending time to the accommodated party, the discharge is a defense against the holder-actor personally and not a "personal" defense in the sense of being forecloseable as to him by negotiation without notice thereof. If such defense against the holder-actor personally results from his violation of a duty which his mere knowledge of the accommodation imposes on him in equity, it should not have mattered in *Fentum v. Pocock* that the indorsee acquired that knowledge after the bill was transferred to him. It is true that under this view *Fentum v. Pocock* and *Laxton v. Peat* would have been legally indistinguishable; but *Fentum v. Pocock* should then have been governed by *Laxton v. Peat* and should even have extended its scope.¹² But if the discharge results from the holder's breach of his agreement to treat the latent accommodation maker or acceptor as surety, that agreement could not, because of the parol evidence rule, have been established by proper proof in either *Fentum v. Pocock* or *Laxton v. Peat*. In this view, the cases were indeed legally indistinguishable, and *Laxton v. Peat* was properly overruled in *Fentum v. Pocock*.

Under this view of the nature of the discharge, implicit in the result of *Fentum v. Pocock*, an extension of time to the accommodated party would not operate to discharge the latent accommodation maker or acceptor even as against an original payee who had made an express oral agreement to treat the accommodation party as surety. After having been several times unsuccessfully questioned,¹³ this view was made explicit and adopted by the Court of Queen's Bench in *Manley v. Boycot*.¹⁴ Since the promotion of negotiability is to be found in protecting the interests of the holder in due course rather than the original payee, the rule in *Fentum v. Pocock* and *Manley v. Boycot* therefore does not seem to have been formulated out of regard for preserving circulability. Nor do the reports of either case make any mention of the possibly deterrent effect of a contrary rule on the currency of negotiable instruments. Indeed, the same reasoning would and did support the denial of the discharge to a latent surety debtor on a non-negotiable bond.

The equity courts, however, seem early to have had a different understanding of the theory underlying a latent surety's discharge.¹⁵ In any

11. See NEGOTIABLE INSTRUMENTS LAW § 29.

12. See notes 22 and 23 *infra*.

13. *Price v. Edmunds*, 10 B. & C. 578 (K. B. 1830); *Nichols v. Norris*, 3 B. & Ad. 41 (K. B. 1831); *Harrison v. Courtauld*, 3 B. & Ad. 36 (K. B. 1832).

14. 2 E. & B. 46 (Q. B. 1853); see *Rolfe v. Wyatt*, 5 C. & P. 181 (C. P. 1831).

15. *Loyd, The Surety* (1917) 66 U. OF PA. L. REV. 40; *Comment* (1925) 38 HARV. L. REV. 954, 958. But see 2 HARE & WALLACE, AM. L. CAS. (5th ed. 1871) 431, 432.

event, in 1855 the Court of Appeal in Chancery in *Davies v. Stainbank*¹⁶ applied its doctrine, already approved in the House of Lords as respects an ostensible principal obligor of a bond,¹⁷ to find the latent accommodation acceptor discharged because of the holder's extension of time to the accommodated drawer. Since the written contract between the holder and acceptor as embodied in the bill "could not be varied in equity any more than at law,"¹⁸ the accommodation acceptor's discharge in Chancery must either have resulted from the holder's violation of an equitably imposed duty not to extend time to the real debtor or release him after knowing him to be such, or have involved a return to the questionable position of *Laxton v. Peat*. Later cases made it plain that the former, and not the latter theory underlay the surety's discharge in Chancery; but this development occurred in the law courts under the statute authorizing the interposition of equitable pleas to actions at law.¹⁹

In 1857 the Court of Queen's Bench, in *Pooley v. Harradine*,²⁰ allowed under such an equitable plea the discharge of an accommodation co-maker against the payee who, though he had not even orally agreed to the suretyship, knew of it when he extended the time of payment. Since the holder's own knowledge of the accommodation raised the duty not to release the principal debtor or extend the time of payment to him,²¹ it was immaterial whether the holder acquired such knowledge before or after taking the instrument: the discharge was not based on a "personal defense" that could be cut off by transfer without notice thereof, and there was no need to imply an agreement by the holder to the accommodation party's position as surety. Because this duty to the accommodation maker or acceptor was imposed on the holder in equity and did not rest on any express or implied in fact contract between the parties, parol evidence proving the existence of the suretyship relation, the holder's knowledge thereof, and his subsequent release of, or extension of time to, the accommodated party did not contradict or otherwise affect the accommodation party's liability on the instrument *as maker or acceptor*. Parol evidence was therefore properly admissible to establish the accommodation party's discharge from further liability *as known surety*.

This theory would support the discharge of an accommodation maker or acceptor not merely as against a payee, or even against an indorsee

16. 6 De G. M. & G. 679 (C. A. 1855).

17. *Oakley v. Pasheller*, 4 Cl. & Fin. 207 (H. L. 1836); *Hollier v. Eyre*, 9 Cl. & Fin. 1 (H. L. 1842).

18. *Pooley v. Harradine*, 7 E. & B. 431, 433 (Ex. Ch. 1857).

19. 17 & 18 Vict., c. 125 (1854).

20. 7 E. & B. 431 (1857), followed as controlling in *Taylor v. Burgess*, 5 H. & N. 1 (Ex. 1859); *Greenough v. McClelland*, 2 El. & El. 424 (Q. B. 1860).

21. And this may reasonably be so expressed whether the duty is not to impair the surety's rights of reimbursement and subrogation, as stated in *Pooley v. Harradine*, or not to increase the surety's contemplated-risk, as suggested by *Arant*. See note 4 *supra*.

who knew of the latent suretyship when he took the instrument, but also against an indorsee who learned of the suretyship only after he acquired the instrument but before he extended the time of payment to the real debtor or released him from liability. And this was expressly held in 1864 by the Court of Queen's Bench in *Bailey v. Edwards*²² on the authority of *Pooley v. Harradine*, and again by the same court the next year in *Ewin v. Lancaster*.²³ It has ever since been the law in England that a latent accommodation maker or acceptor will be deemed discharged by any holder of the instrument who, after having acquired knowledge of the suretyship relation, releases the accommodated party or extends the time of payment to him.²⁴

In the United States the discharge was often at first denied in law courts, largely because of the influence of *Fentum v. Pocock*,²⁵ aided no doubt by the mistaken belief that it had been decided by the illustrious Lord Mansfield²⁶ and so was entitled to especial respect on commercial matters. But, in equity, the discharge seems to have been regularly allowed here as early as in England.²⁷ In several instances, it was allowed here in law courts even before *Pooley v. Harradine* was decided in England;²⁸ and in at least one of these an American law court, clearly recognizing the theory underlying the rule, allowed the discharge as against an indorsee who learned of the suretyship only after he had acquired the instrument but before he extended the time of payment to the real debtor.²⁹ A number of later cases extended the scope of the

22. 4 B. & S. 761 (Ex. Ch. 1864).

23. 6 B. & S. 571 (Q. B. 1865) (reviews the cases and gives complete exposition of the theory underlying them).

24. *Oriental Fin. Corp. v. Overend, Gurney & Co.*, L. R. 7 Ch. App. 142 (1871), *aff'd*, L. R. 7 Eng. & Ir. App. 348 (1874); see also *Swire v. Redman*, 1 Q. B. D. 536 (1876). See generally CHALMERS, *BILLS OF EXCHANGE* (8th ed. 1919) 251 *et seq.*

25. Many times cited in American courts as controlling. See, e.g., *Cronise v. Kellogg*, 20 Ill. 11 (1858); *Lambert v. Sandford*, 2 Blackf. 137 (Ind. 1828); *Clopper's Adm'r v. Union Bank*, 7 Harris & J. 92 (Md. 1826); *Hoge v. Lansing*, 35 N. Y. 136 (1866).

26. Daniel attributed *Fentum v. Pocock* to Lord (William Murray) Mansfield and stressed the importance of this through five editions. 2 DANIEL, *NEGOTIABLE INSTRUMENTS* (5th ed. 1903) §§ 1333, 1334. Lord Mansfield was Chief Justice of King's Bench from 1756 to 1788, and died in 1793, twenty years before *Fentum v. Pocock*. The error was omitted without comment in the sixth edition (1913), but the draftsmen of the *Negotiable Instruments Law* referred to the fourth edition. BRANNAN'S *NEGOTIABLE INSTRUMENTS LAW* (6th ed. 1938) *Commissioners' Notes*.

27. *Yates v. Donaldson*, 5 Md. 389 (1854); *Farrington v. Gallaway*, 10 Ohio 543 (1841); *Wilson v. Green*, 25 Vt. 450 (1853); *Glenn v. Morgan*, 23 W. Va. 467 (1884).

28. *Branch Bank v. James*, 9 Ala. 949 (1846); *Adle v. Metoyer*, 1 La. Ann. 254 (1846) (based on civil law doctrines); *Mariners' Bank v. Abbott*, 28 Me. 280 (1848); *Harris v. Brooks*, 21 Pick. 195 (Mass. 1838); *Grafton Bank v. Kent*, 4 N. H. 221 (1827).

29. *Wheat v. Kendall*, 6 N. H. 504 (1834) (decided on authority of *Grafton Bank v. Kent*, 4 N. H. 221 (1827), wherein plaintiff was payee).

rule to such an indorsee;³⁰ and in many other cases the theory of decision was, as in *Pooley v. Harradine*, equally applicable to indorsees with knowledge subsequent to transfer, although such indorsees were not involved in the cases.³¹ In brief, the development was generally much the same as in England: the rule was often initially equitable in origin; its introduction into law courts, while accomplished in some instances by "natural" processes, was here also accelerated by the gradual adoption of a reformed procedure and made complete by the union of law and equity under the codes;³² and the same rationale for it was finally worked out and accepted.³³

EARLY DEVELOPMENT UNDER THE NEGOTIABLE INSTRUMENTS LAW — SO-CALLED MAJORITY RULE

The first courts to apply the Negotiable Instruments Law to this situation, however, purported to find in its provisions a complete denial of the accommodation maker's or acceptor's discharge as sureties.³⁴ These courts' interpretation of the Negotiable Instruments Law was, at best, a matter of construing the Act from a bare reading of its most obviously

30. *Hall v. Capital Bank*, 71 Ga. 715 (1883); *Lauman, Hedges & Co. v. Nichols*, 15 Iowa 161 (1863); *Meggett v. Baum*, 57 Miss. 22 (1879); *Bank of Mo. v. Matson*, 26 Mo. 243 (1858); *Westervelt v. Frech*, 33 N. J. Eq. 451 (1881) (in equity).

31. See cases collected in Hening, *The Uniform Negotiable Instruments Law, Is It Producing Uniformity and Certainty in the Law Merchant?* (1911) 59 U. OF PA. L. REV. 532, 535, n. 100. See especially *Canadian Bank v. Coumbe*, 47 Mich. 358 (1882); *Grafton Bank v. Kent*, 4 N. H. 221 (1827); *Hubbard v. Gurney*, 64 N. Y. 457 (1876).

32. See *Rose v. Williams*, 5 Kan. 483 (1870).

33. It is, perhaps, best stated in the early case of *Grafton Bank v. Kent*, 4 N. H. 221 (1827), taken together with *Wheat v. Kendall*, 6 N. H. 504 (1834), which applied it in its widest scope.

There was no serious conflict of decisions on the question of discharge requiring resolution by the Negotiable Instruments Law. An apparent conflict existed because, as in England, the discharge was at first denied at law in jurisdictions allowing it in equity. See cases cited *supra* note 27. Apparent conflicts are readily resolved if the decisions are viewed chronologically rather than merely cumulatively, as a whole, or in the development in a given jurisdiction. See, e.g., in New York, *King v. Baldwin*, 17 Johns. 384 (N. Y. 1819); *Howard Banking Co. v. Welchman*, 6 Bos. 280 (N. Y. 1860); *Hoge v. Lansing*, 35 N. Y. 136 (1866). The latter two cases, which were decided on the authority of *Fentum v. Pocock*, were overruled and the doctrine of *Pooley v. Harradine* established in the leading case of *Hubbard v. Gurney*, 64 N. Y. 457 (1876). Decisions allowing the discharge only against original payees, or indorsees with knowledge of the accommodation when they took the instruments, did not necessarily conflict with decisions allowing it even against indorsees who learned of the accommodation after transfer. See cases cited *supra* note 31. To the extent that there was a real conflict, the jurisdictions denying the discharge were distinctly in the minority; and even in these the discharge seems to have been allowed at least in equity by the time of the Negotiable Instruments Law. See Ames, *The Negotiable Instruments Law* (1900) 14 HARV. L. REV. 241, 255.

34. *Ceilers v. Meachem*, 49 Ore. 186, 89 Pac. 426 (1907); *Vanderford v. Farmers' & Mech. Nat. Bank*, 105 Md. 164, 66 Atl. 47 (1907).

pertinent terms.³⁵ Section 192 was thought to divide all parties to negotiable instruments into two classes: those primarily and those secondarily liable on the instrument.³⁶ Since Section 120 expressly provides for the discharge of parties secondarily liable because of release or extension of time, whereas no section similarly provides for the discharge of parties primarily liable, application of the maxim *expressio unius est exclusio alterius* was thought to prevent the discharge of parties primarily liable on these grounds. Significance was also attached to the juxtaposition of Section 119, which provides for the discharge of the instrument (and, necessarily, the discharge of all parties) as a further indication that parties primarily liable were to be discharged only as an incident to the discharge of the instrument by payment or its accepted equivalents.³⁷

This interpretation not only restored the result of *Fentum v. Pocock* and *Manley v. Boycot* by denying the discharge of latent accommodation makers and acceptors as against original payees—it went even further. Its literal application would, and in certain cases did, exceed both the rigor and the reason of *Fentum v. Pocock* and *Manley v. Boycot* by denying the discharge even to accommodation makers who added the word “surety” to their signatures on the face of the instrument!³⁸

Still, except perhaps for these extreme cases, there is reason to believe that the draftsmen of the Act intended this interpretation of Sections 192, 119, and 120. The draftsmen consulted *Daniel on Negotiable Instruments*, which approved the result of *Fentum v. Pocock* and *Manley*

35. Not even this can be said for some of the variant statements of the problem. Some courts attached significance in this connection to §§ 29, 60. See, *e.g.*, *Cowan v. Ramsey*, 15 Ariz. 533, 140 Pac. 501 (1914); *Wolstenholme v. Smith*, 34 Utah 300, 97 Pac. 329 (1908). Section 60 (or 62) adds nothing to the argument already met in *Poolcy v. Harradine*, *supra*, and § 29 does not preclude an accommodation party from asserting defenses other than the mere want of consideration for the instrument running directly to him. See p. 408 *infra*.

36. This grouping alone has been said to exclude any other category and so abolish suretyship in negotiable instruments altogether. See, *e.g.*, *Richards v. Market Exch. Bank*, 81 Ohio St. 348, 90 N. E. 1000 (1910); *Cellers v. Meachem*, 49 Ore. 186, 89 Pac. 426 (1907). But such an appeal to Section 192 succeeds in proving too much; for surety parties have not been deprived of their rights of reimbursement and subrogation because of the lack of express provision in the Negotiable Instruments Law. See Notes (1925) 36 A. L. R. 553, (1932) 77 A. L. R. 668, (1931) 72 A. L. R. 1063.

37. The elliptical statement of this result in some cases seems to have induced a belief in others that the discharge of parties primarily liable, as such, is provided for in Section 119 and that the discharge for releases or extensions is denied because these grounds are not enumerated therein. See, *e.g.*, *Sloan v. Gates*, 166 Tenn. 446, 62 S. W. (2d) 52 (1933); *Continental Mut. Sav. Bank v. Elliott*, 166 Wash. 283, 6 P. (2d) 633 (1932). This misconception of Section 119 may be seen as early as *Vanderford v. Farmers' & Mech. Nat. Bank*, 105 Md. 164, 66 Atl. 47 (1907).

38. *Cellers v. Meachem*, 49 Ore. 186, 89 Pac. 426 (1907); *Lenoir v. Cannon*, 4 Higgins 509 (Tenn. Civ. App. 1913); see 2 DANIEL, NEGOTIABLE INSTRUMENTS LAW (4th ed. 1891) § 1332.

v. Boycot,³⁹ and referred to this work as authority.⁴⁰ Again, Dean Ames' criticism of the Act anticipated this interpretation;⁴¹ and Eaton, one of the chief proponents of the Act, accepted this interpretation in defending the Act against the Dean's strictures. It embodied one line of authority, he said, not necessarily wrong because it disagreed with the distinguished Dean's view of the proper rule.⁴² Finally, when the early decisions announcing this interpretation were criticised, the chief draftsman⁴³ and a committee⁴⁴ of the Conference of Commissioners on Uniform State Laws rose to their defense. Indeed, "To suggest that Homer nodded in the draughting of this section, and that the expression 'person secondarily liable' in the opening sentence of §120 was used inadvertently in the Common-Law sense of 'secondary party' (or surety), and not in the sense of the definition of §192, would be an improper reflection on the learned draughtsman of the section."⁴⁵

But, intended or not, the ready acceptance of this interpretation of Sections 192, 119 and 120 is to be attributed as much to the force of repetition as to any real examination of the pertinent provisions of the Act in the light of the state and effect of the prior law, the scope and purposes of its codification, and the effect of the interrelation of these factors on the formulation of a satisfactory rule on the point. In 1907 the Oregon court in *Cellers v. Meachem*⁴⁶ found a "ready-made" interpretation of Sections 192, 119 and 120 awaiting it,⁴⁷ remarked merely that it did not fit its own prior law, failed to note that it was of the same cut as *Fentum v. Pocock*, long since out-moded even in courts of law,⁴⁸ and wore it for an occasion for which *Fentum v. Pocock* itself had never been designed.⁴⁹ In the same year the Maryland court, in *Vanderford v. Farmers' & Mechanics' National Bank*,⁵⁰ arrived at this

39. 2 DANIEL, NEGOTIABLE INSTRUMENTS (4th ed. 1891) §1337.

40. BRANNAN'S NEGOTIABLE INSTRUMENTS LAW (6th ed. 1938) 65, *Commissioners' Notes* (d) and (e) to §120.

41. Ames, *The Negotiable Instruments Law* (1900) 14 HARV. L. REV. 241, 255.

42. Eaton, *The Negotiable Instruments Law: Its History and Its Practical Operation* (1904) 2 MICH. L. REV. 260.

43. CRAWFORD, NEGOTIABLE INSTRUMENTS LAW ANNOTATED (4th ed. 1916) 201.

44. *Report of the Committee on Uniformity of Judicial Decisions in Cases Arising under Uniform Laws* (1914) 1 A. B. A. J. 24, 41-43.

45. BIGELOW, BILLS, NOTES, AND CHECKS (3d ed. 1928) 497, n. 2. But see p. 412 *infra*.

46. 49 Ore. 186, 89 Pac. 426 (1907).

47. EATON & GILBERT, COMMERCIAL PAPER AND THE NEGOTIABLE INSTRUMENTS LAW (1903) §123f.

48. EATON & GILBERT found in Sections 192, 119, and 120 the resolution of a "conflict" which their citation of authorities reveal was merely the ancient conflict between courts of law and equity, long since resolved. The authorities they cite do not even reveal the true state of the decisions at law at that time.

49. 2 DANIEL, NEGOTIABLE INSTRUMENTS (4th ed. 1891) 348-349.

50. 105 Md. 164, 66 Atl. 47 (1907).

same interpretation, apparently quite independently of the *Cellers* case. Maryland, however, was one of the few jurisdictions which, at the time of adoption of the Negotiable Instruments Law, had neither reformed its procedure nor departed from the doctrine of *Fentum v. Pocock* in its law courts, although it seems to have allowed the discharge in equity as early as 1854.⁵¹ Thus other jurisdictions might very reasonably have viewed the *Vanderford* case as signifying merely that in Maryland the discharge was still available only in equity; for, if the Act did not otherwise deny the discharge of accommodation makers and acceptors, its failure to provide expressly for their discharge in statute law would not preclude the continued applicability of an equity which had existed before the Negotiable Instruments Law.⁵²

Yet the *Cellers* and *Vanderford* cases were followed by the Utah court in the following year,⁵³ and in 1910 the tide of precedent overwhelmed the Ohio and Washington courts into refusals to discharge accommodation makers and acceptors.⁵⁴ By 1912 it remained only for the Massachusetts court⁵⁵ to deliver the classic statement of this interpretation of Sections 192, 119 and 120 to cause a rapid succession of courts to board the bandwagon,⁵⁶ though this meant the disavowal of their own prior law and "the law generally in this country."⁵⁷ In doing so, the courts frequently parroted the assertions that negotiability, justice, and, certainly, uniformity, would be promoted by refusing to discharge accommodation makers and acceptors.⁵⁸ The mere force of these early cases alone almost invariably precluded the courts from an original examination of the provisions of the Negotiable Instruments Law or the validity of their justifying assertions.⁵⁹

51. *Yates v. Donaldson*, 5 Md. 389 (1854).

52. The Negotiable Instruments Law has been held in another connection to state the law but not to preclude equitable remedies. See *Knaffle v. Knoxville Banking & Trust Co.*, 128 Tenn. 181, 159 S. W. 838 (1913).

53. *Wolstenholme v. Smith*, 34 Utah 300, 97 Pac. 329 (1908).

54. *Richards v. Market Exch. Bank Co.*, 81 Ohio St. 348, 90 N. E. 1000 (1910); *Bradley Eng. & Mfg. Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170 (1910).

55. *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679 (1912), cited as the "best expression" of the purpose and effect of the Negotiable Instruments Law in *Sicherman, Construction of Clause in Uniform State Laws Providing for Uniformity of Interpretation* (1916) 2 A. B. A. J. 60, 72.

56. See successive annotations in Notes (1927) 48 A. L. R. 715, (1930) 65 A. L. R. 1425, (1937) 108 A. L. R. 1088.

57. *Wolstenholme v. Smith*, 34 Utah 300, 302, 97 Pac. 329, 330 (1908).

58. See cases cited note 3 *supra*.

59. While the rolling-snowball effect of the *Cellers* and *Vanderford* cases may be seen in many, if not most, later cases, see especially *Mortgage Guar. Co. v. Chotiner*, 8 Cal. (2d) 110, 64 P. (2d) 138 (1936); *Fox v. Terre Haute Nat. Bank*, 78 Ind. App. 666, 129 N. E. 33 (1920); *Citizens' Bank v. Bowden*, 98 Kan. 140, 157 Pac. 429 (1916).

THE JUSTICE OR INJUSTICE OF THE RULE PERMITTING DISCHARGE

The assertion that the side of justice lies with *Fentum v. Pocock*, *Manley v. Boycot*, and the earlier Negotiable Instruments Law rule, rather than with the rule of *Pooley v. Harradine*, will not bear very close scrutiny. It is said that to allow the latent accommodation maker to claim the status of surety would be to set a trap for the unwary lender, and that to deny him that status would be no more than to insist that the accommodation maker observe the very letter of his contract.

This argument, already met in *Pooley v. Harradine*, overlooks the very occasion for the operation of the rule of that case. To be able to insist on the very letter of the contract embodied in the instrument, the holder need merely refrain from prejudicing the accommodation maker after he knows his status. To say that this would allow the rights and liabilities of the parties to be lightly shaken by parol proof is to misapprehend, as did the law courts before *Pooley v. Harradine*, the nature of the parol evidence rule, disregard the wide scope for the proper function of parol proof, and underestimate the protection afforded the holder by imposing upon the accommodation party the burden of proving the facts entitling him to be discharged. This suggests that a factual study of the effect of the rule which permits discharge might well have preceded its abolition.⁶⁰

Conceding for a moment that it is "a trap for the unwary lender" to allow the latent accommodation co-maker to claim the status of surety, this argument affords no support for those decisions which deny the discharge to accommodation makers or co-makers who add the word "surety," or the like, to their signatures. Moreover, it seems clear that, where the discharge is claimed by an accommodation maker because of a release or an extension of time to a person not appearing as a party to the instrument, the holder cannot fail to know that the maker stands as surety to the person with whom he dealt. As a matter of fact, the holder will generally know of the suretyship relation where the accommodated party, to whom time is extended or a release granted, is a payee-indorser — or even a co-maker. This suggests a possible factual study concerning the holder's knowledge of the co-maker's surety status.

If the holder wishes to avoid "all of the difficulties attendant upon proving whether in a particular case the holder had notice of the accom-

60. See Hening, *The Uniform Negotiable Instruments Law, Is It Producing Uniformity and Certainty in the Law Merchant?* (1911) 59 U. OF PA. L. REV. 532, 536: "Rules of commercial law and of suretyship, so long continued, so widely adopted and so generally regarded by our courts as being consonant with justice should never have been overthrown unless upon a demonstration that the American courts had all along been deceived by perjurers into discharging parties to commercial paper who pretended to be sureties, but were in reality, as in appearance, primarily liable."

modation character of the signing,"⁶¹ he should abide by the very contract he would later wish to enforce against one who on the face of the instrument appears as co-debtor, sole debtor, or sole primary debtor. He should proceed against the party by the terms of the instrument "absolutely required to pay the same," or at least obtain that primary party's consent to any extensions or releases he proposes to grant to another who may not be a party to the instrument at all, or may be only secondarily liable as payee-indorser, or, at best, may be only primary co-debtor and not primary sole debtor. And, if he wishes only to be a forbearing creditor, the holder need not fear the consequences of his mere indulgence to the accommodated debtor.⁶²

Quite apart from its special application to commercial paper, the discharge because of release or extension of time may be objectionable on the ground that the accommodation party may not be injured by the extension or release.⁶³ Yet the real objections may be reached by modifying the operation of the right of discharge without abrogating it entirely—a method which will enable a court to balance the equities of a situation.⁶⁴

A release or an extension of time may cause a surety no actual damage—the extension, if it assures ultimate payment by the principal debtor, may even be a distinct advantage to the surety.⁶⁵ But in certain situations, such as that in which the principal debtor's financial strength is declining, a release or extension of time may be positively detrimental to the surety.⁶⁶ To avoid permitting the surety to blow both hot and cold—remaining silent when an extension is granted, which may the better enable the principal debtor to pay; yet claiming a discharge when, despite the extension, the surety is nevertheless called upon to pay—certain vigilance might be demanded of him on pain of being otherwise deemed to have consented to the extension.⁶⁷ Or, if the surety is not deprived of his right to reimbursement upon payment—since the deprivation of this right is certainly no less "technical" than granting the discharge—all reason for the discharge disappears because no actual prejudice will

61. Turner [Steffen], *A Factual Analysis of Certain Proposed Amendments to the Negotiable Instruments Law* (1929) 38 YALE L. J. 1047, 1056.

62. 3 DANIEL, *NEGOTIABLE INSTRUMENTS* (7th ed. 1933) §1527.

63. 4 WILLISTON, *CONTRACTS* (rev. ed. 1936) §1222.

64. See CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) 152 (directed to modifying the operation of the discharge, not its abolition).

65. As is pointed out in *Sloan v. Gates*, 166 Tenn. 446, 62 S. W. (2d) 52 (1933) (denying the discharge under the Negotiable Instruments Law).

66. See *Scandinavian Amer. Bank v. Westby*, 41 N. D. 276, 172 N. W. 665 (1918) (involves surrender of collateral).

67. *E.g.*, requiring him to tender payment at maturity (see CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) 153) or, at least to object seasonably to the extension of time if he knows, or should know of it. But see Note (1936) 101 A. L. R. 1310.

result to the vigilant surety.⁶⁸ The best solution seems to be to grant a discharge only to the extent of a showing of actual damage.⁶⁹

The argument may be made that the earlier rule under the Negotiable Instruments Law will work equally well, once it is established and known to parties to borrowing transactions. Those who lend their credit to others will learn, the argument runs, that if they sign as accommodation indorsers they will be entitled to the favored status of surety, but that, if they sign as accommodation makers, they are impliedly consenting to a possible release or extension of time.⁷⁰ That, at least as to an extension of time, was one justification for the rule of *Fentum v. Pocock*.⁷¹ Does it square with the plain everyday facts of life? If it does there was no real injustice in the rule of *Fentum v. Pocock* and there was none in the earlier rule under the Negotiable Instruments Law.

A factual analysis made by Professor Steffen to determine just what is the general understanding of the effect of signing as accommodation maker rather than as indorser indicates, although admittedly not at all conclusively, that it is in accord with the differentiation in their positions made in the early interpretation of Sections 192, 119 and 120 of the Negotiable Instruments Law.⁷² A questionnaire, containing the following interrogatories, was sent "to some two hundred and fifty banks, trust companies, bond and investment houses, and one hundred and fifty lawyers and to teachers in Association schools giving the negotiable instruments course—a matter all told of about four hundred questionnaires":

"(a) In your experience, do accommodation parties now assume that in signing as maker or co-maker their obligation is greater than if they signed on the back of the paper as endorser?

"(b) If so, is this accounted for by the fact that, as endorser, an accommodation signer is entitled to notice of dishonor, while, as maker or co-maker, he is not?

68. See *Finzer v. Peter*, 120 Neb. 389, 232 N. W. 762 (1930) (surety maker allowed to proceed against principal debtor despite binding extension of time which had previously been held not to discharge surety). Compare *Mallet v. Thompson*, 5 Esp. 178 (K. B. 1804).

69. 4 WILLISTON, *CONTRACTS* (rev. ed. 1936) §1222; CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) 153. But see ARANT, *SURETYSHIP AND GUARANTY* (1931) 287 suggesting that release gives a complete discharge where the standard business practice seems clear. Whether extension of time would discharge the surety depends on what is found to be standard business practice—a determination which seems to require an extended factual survey.

70. See Turner [Steffen], *Revision of the Negotiable Instruments Law* (1928) 38 YALE L. J. 25, 47-49. This Article was followed by a factual analysis of the validity of the underlying assumption. Turner [Steffen], *A Factual Analysis of Certain Proposed Amendments to the Negotiable Instruments Law* (1929) 38 YALE L. J. 1047, 1056-1058.

71. 2 DANIEL, *NEGOTIABLE INSTRUMENTS* (4th ed. 1891) §1333a, n. 2.

72. Turner [Steffen], *A Factual Analysis of Certain Proposed Amendments to the Negotiable Instruments Law* (1929) 38 YALE L. J. 1047, 1056-1058.

"(c) Is it convenient commercially to provide either of two possible contracts for the accommodation signer, depending on his bargain, as is done in most states; that is, if he signs as endorser, to accord him the protection of any signer in that capacity, but, if he signs as maker or co-maker, to provide that he assumes the obligation of a primary party and is not discharged, for example, because of an extension of time?

"(d) Is there any injustice in denying suretyship defenses to the accommodation maker?"⁷³

In response to the first two interrogatories, over "three to one of the total replies indicated the existence of such a general understanding." Professor Steffen remarks that "this general finding has considerable support also in the opinions of the majority courts in which it is said that the accommodation maker in so signing assumes a 'primary obligation,' " and that "evidently this is more than a technical view."⁷⁴ But it has never been denied that the accommodation maker is a party primarily liable on the instrument. The discovery, at great labor, that he is a party primarily liable adds nothing to the argument and leaves unanswered the fundamental question of whether, in signing as accommodation maker rather than as indorser, he understands that he has impliedly consented to a release of the principal debtor or an extension of time.

Interrogatory (c) is thought to have raised the issue squarely;⁷⁵ but it is doubtful whether it did so, even in conjunction with interrogatories (a) and (b). Interrogatory (a) was so generally phrased that an affirmative response may indicate no more than that an accommodation maker's obligation is regarded as more onerous than an accommodation indorser's because the former is not entitled to notice of dishonor, as suggested by interrogatory (b) itself. Interrogatory (c) may have done no more than raise the question of "commercial convenience" in the minds of those responding.

"Among the teachers the affirmative vote was greater," Professor Steffen states, "but the attorneys by a majority of three favored the contrary view that a 'surety' is entitled to the usual suretyship defenses regardless of the capacity in which he signs. The answers to (d) concerning the possible injustice of the majority rule were colored largely by the view taken of the parties' understanding of the situation. The bankers who thought that accommodation parties now understand their obligations to be greater as maker than as indorser answered that there was no injustice in denying such signers suretyship defenses. This amounted to saying that a signing as maker constituted a waiver of

73. *Id.* at 1056-1057.

74. *Id.* at 1057.

75. *Ibid.*

these defenses.”⁷⁶ From all of this Professor Steffen concludes that, “although this evidence, taken as a whole, cannot of course be regarded as at all conclusive, it certainly affords little support for the proposed amendment on the point [which would restore the rule prior to the Negotiable Instruments Law]. It would be better to change the rule in the minority states to accord with that generally obtaining.”⁷⁷

If the general understanding is as stated, the conclusion which Professor Steffen draws clearly follows. The evidence from the survey does indeed “afford little support” for the contrary conclusion; but the present writer questions, even beyond the point conceded, the validity of the evidence upon which Professor Steffen bases his conclusion. In doing so, he is fully aware that he himself has not made a survey any more scientific in method and that he bases his conclusion on traditional legal analysis confirmed only by impressions gained from casual observations. But the writer’s viewpoint is not disturbed by the survey made, not merely because of the inconclusiveness of its results or the failure of the interrogatories, in his opinion, to raise the basic issue squarely, but because of what he deems fatal weaknesses in the survey’s method, which render its results undependable as well as inconclusive.

In the first place, the group questioned has too high a degree of “selectivity.” To have real value statistically, the group questioned, although “sampled,” should not have been “selected.” By far the larger element in the group may well have been drawn from that segment of the population least likely ever to have functioned as accommodation parties. Indeed, the larger element in the group was of the lender rather than the borrower class — or at least responded in the capacity of lenders. Even the responses of the lawyers, if divided as their answers have been to the writer’s casual inquiries, might be found to “break down” into the responses of “plaintiffs’” or “defendants’” lawyers. Their division over question (d) is some indication to one not having the original data before him that they did so divide. The number of lawyers’ affirmative responses added to those of the bankers would, because of the “weighting” of the group numerically in favor of bankers, itself explain the three to one response to the first interrogatory (admitting for the moment that it raised the fundamental point at issue). The division in the vote of the teachers is more difficult to explain away; but it is believed that sufficient statistical undependability of method has been suggested to venture a further *caveat* of the result.

Indeed, it might have been proper in this situation to resort to “selectivity” of the exactly opposite group. After all, it is the borrowers’ notions of the effect of signing as maker or indorser which are to be

76. *Id.* at 1057-1058. Compare Daniel’s view of the justification for *Fentum v. Po-cock* and *Manley v. Boycot*, *supra* note 71.

77. *Id.* at 1058.

determined and not the lenders' opinions of the borrowers' notions. If an "unselected" group is not to be "sampled," should not a group of known accommodation parties be "selected"? Since their reactions would be recorded as of after the fact of signing, their responses should no doubt be checked, as for example, against the Keeler polygraph, or lie-detector.⁷⁸

But the writer's impressions are that the average accommodation maker, unacquainted with the legal implications that may arise from the position of his signature on an instrument and equally uninitiated in credit practices, would not read into an instrument, which recited only that he promised to pay a certain amount on a certain day, any implied consent to the holder's extension of time to the accommodated party by which he would be bound as well. Much less would he read into such an instrument any implied consent to a release of the principal debtor by the holder which would be effective against him. And when the law supplies some of the terms of the instrument, those terms should not depart from the ordinary meaning of the words actually used, until or unless that meaning can be demonstrated to have defeated the commercial purposes for which the instrument is designed. This suggests the need for a factual study to determine whether the existence of the rights of sureties on commercial paper impedes its currency among lenders.

Furthermore, it is doubtful that the average accommodation signer usually has any choice as to whether he will sign as accommodation maker or indorser.⁷⁹ On the other hand, if the creditor demands for his greater security a "waiver of defenses"—as of extension of time—he may phrase a clause with that effect to which the accommodation maker will usually not be in a position to object; and, while, if he does not object, he will be no better off than if the rule of Sections 192, 119 and 120 obtained,⁸⁰ at least he will be apprised at the outset of his lack of defenses. Moreover, insertion of an express waiver requires positive action at the time the contract is entered into; and, while the creditor, because

78. That there are other, statistical, methods for insuring greater dependability, see the several studies of Stuart Rice and Herman C. Beyle on measuring public opinion and attitudes.

79. Again the writer can offer only his casual, but verifiable, observation: notes issued by corporate lenders standardly provide for co-maker loans or, by express contractual provision, take from the accommodation indorser much of the advantage of the position of his signature on the note. While the loan officers in requiring these forms are responding only to this standardization, these forms doubtless have been drafted by the legal department with all the legal implications thereof in mind.

80. But that such an express waiver of defenses might avoid oppression occasioned by apparent collusion between accommodated party and holder where the blunt rule of §§ 192-119-120 would not do so, see *Tuten v. Bowden*, 173 S. C. 256, 175 S. E. 510 (1934) (prior consent to "any extension of time" construed as not authorizing successive extensions over a sixteen-year period).

of his superior bargaining position, can very probably obtain consent in advance to an extension of time, it is not so likely that he could then obtain consent to releasing the principal debtor who, at that time, it is ordinarily assumed, will actually pay the instrument. Without such an express waiver clause, it is difficult to see any commercial purpose to be served by refusing the discharge, other than the possible need to promote negotiability, that would warrant the creditor's being allowed so flagrant an opportunity to oppress.⁸¹

It has been suggested in further denial of the injustice of the earlier rule under the Negotiable Instruments Law that, in terms of the total amount of obligations, most present-day accommodation is effected by corporate stockholders or officers signing to accommodate their corporations and that "in neither of [these] situations are the refinements of common law suretyship particularly appropriate."⁸² This statement may be conceded both as to fact and conclusion; yet it stands only as an argument that accommodation parties of this sort be accorded special treatment. Indeed, it has been suggested that stockholders and officers "accommodating" their corporations ought not to be regarded as parties who sign "without receiving value therefor."⁸³ But in any event, in the hundred-odd cases examined in this study, except in a very few cases, such was not the character of the accommodation parties involved.

EFFECT ON NEGOTIABILITY OF THE RULE PERMITTING DISCHARGE

No factual analysis was made to support the assertion that the rule of *Pooley v. Harradine* interfered with the currency of commercial paper; and perhaps a poll of present, past, and future holders of accommodation commercial paper should have preceded the writer's assertion of the contrary view. But it is thought that some value remains in a more traditional approach to the question.

The currency of commercial paper hardly seems affected by a rule that requires only that a holder abstain from impairing the known rights of another, the while retaining all his own rights to enforce the letter of his contract. To promote negotiability, holders in due course should indeed be "free from any defect of title of prior parties, and be free from defenses available to prior parties among themselves" and entitled to "enforce payment of the instrument for the full amount thereof.

81. This suggests yet another factual study: to what extent, under the earlier Negotiable Instruments Law rule or with an express waiver of releases or extensions, does such oppression occur? For seeming judicial recognition that it does occur, see *Vernon Center State Bank v. Mangelsen*, 166 Minn. 472, 208 N. W. 186 (1926). See note 80 *supra*.

82. Turner [Steffen], *Revision of the Negotiable Instruments Law* (1928) 38 YALE L. J. 25, 49.

83. Comment (1935) 19 MARQ. L. REV. 122, 125.

. . .”⁸⁴ And mere knowledge of the accommodation character of the instrument should not defeat these rights.⁸⁵ But the discharge of the accommodation maker or acceptor does not, under the rule of *Pooley v. Harradine*, result from any “defect of title of prior parties” or “defenses available to prior parties among themselves,” or even merely from the holder’s knowledge of the accommodation character of the instrument. The accommodation party does not assert the kind of *defense* of which the currency of commercial paper requires that holders in due course be freed. He claims, however, a *discharge*, by reason of the holder’s own conduct subsequent to his having acquired knowledge of the accommodation, from a liability that would otherwise subsist despite the holder’s knowledge. Surely, the currency of negotiable instruments does not require that the holder in due course be free, not only from prior defects and defenses, but from the consequences of his own subsequent inequitable conduct as well.⁸⁶

But, if it is said that the mere existence of the latent suretyship is after all the ultimate source of the accommodation party’s discharge and that it is therefore to be likened to a defense “available to prior parties among themselves,” which should be cut off by transfer as respects an indorsee without prior or contemporaneous notice of the fact of suretyship, the question arises whether this immunity from the rule allowing the discharge should be extended to one who, in all other respects a holder in due course, does have knowledge of the suretyship when the instrument is transferred to him.

Even if furtherance of currency of bills and notes should require extension of immunity from the rule to such an indorsee, there seems no reason for extending this immunity to an original payee who has notice of the suretyship. The promotion of negotiability, if it requires any modification in the *Pooley v. Harradine* rule at all, would seem to be sufficiently served by protecting from the operation of the rule of discharge those indorsees who are in all respects holders in due course or, at most, those indorsees who are holders in due course in all respects other than their knowledge of the suretyship at the time of taking the instrument.⁸⁷ Yet the earlier rule under the Negotiable Instruments Law extended the immunity to all holders of commercial paper under an interpretation denying the discharge as readily to patent as to latent sureties. Such promotion of circulation — if that alone occasioned the change in the law — might be likened to calling on Æolus to ventilate a cottage.

84. NEGOTIABLE INSTRUMENTS LAW § 57.

85. See NEGOTIABLE INSTRUMENTS LAW § 29.

86. BRANNAN’S NEGOTIABLE INSTRUMENTS LAW (3d ed. 1920) 315; Hening, *The Uniform Negotiable Instruments Law, Is It Producing Uniformity in the Law Merchant?* (1911) 59 U. OF PA. L. REV. 532, 546; McMahon, *Sureties under the Negotiable Instruments Law* (1910) 8 OHIO L. REP. 25, 30.

87. See note 5 *supra*.

AMENDMENT AND REINTERPRETATION

If the above discussion has made clear the necessity for replacing the rule of the *Cellers* and *Vanderford* cases with that of *Pooley v. Harradine*, there remains the question whether this change requires an amendment of the Negotiable Instruments Law, or merely reinterpretation, or both.

The most meritorious objection to amendment—that it not be done piece-meal⁸⁸—has been met. Successive committees of the Conference of Commissioners on Uniform State Laws have reported a comprehensive set of amendments, including amendments to Section 120, which substitute the term “a party to a negotiable instrument” for the term “a person secondarily liable” in the introductory sentence. The amendment first suggested by the Conference⁸⁹ deleted all reference to suretyship bases for discharge, thus proposing to make clear a return to the rules of suretyship supervening the law of negotiable instruments. This amendment has been adopted only in West Virginia, with an additional disclaimer of any reference to the law of suretyship,⁹⁰ although not in the form suggested by Professor Britton, who foresaw the continued influence, via textbook and encyclopedia learning, of the *Cellers* and *Vanderford* cases.⁹¹ The unkind fate accorded this amendment in *Marshall County Bank v. Fenner*⁹² may have suggested the need for providing expressly in the Negotiable Instruments Law for the discharge of surety makers and acceptors. In any event, the amendment now proposed so provides.⁹³

An additional argument against amendment is that the rule of *Pooley v. Harradine* can be restored by reinterpretation of the Act;⁹⁴ and so

88. Hargest, *Keeping the Uniform State Laws Uniform* (1927) 76 U. OF PA. L. REV. 178; Beutel, *The Negotiable Instruments Act Should Not Be Amended* (1932) 80 U. OF PA. L. REV. 368.

89. Britton, *Proposed Amendments to the Uniform Negotiable Instruments Law* (1928) 22 ILL. L. REV. 815, 830-831.

90. “This section does not include the rules governing the discharge of a surety or party secondarily liable because of such secondary liability.” BRANNAN’S NEGOTIABLE INSTRUMENTS LAW (6th ed. 1938) *Statutory Variations*, 65.

91. Britton, *Proposed Amendments to the Uniform Negotiable Instruments Law* (1928) 22 ILL. L. REV. 815, 831 suggests that “it might be well to add that the section shall not be interpreted to deprive any party to an instrument of any right which he may have under the law of suretyship.”

92. 113 W. Va. 451, 168 S. E. 375 (1933).

93. STEFFEN, CASES ON COMMERCIAL AND INVESTMENT PAPER (1939) *Statutory Material*, 57.

94. Beutel, *The Negotiable Instruments Act Should Not Be Amended* (1932) 80 U. OF PA. L. REV. 368. See also Beutel, *The Necessity of a New Technique of Interpreting the N. I. L.—The Civil Law Analogy* (1931) 6 TULANE L. REV. 1; Beutel, *Common Law Judicial Technique and the Law of Negotiable Instruments—Two Unfortunate Decisions* (1934) 9 TULANE L. REV. 64.

it can. Indeed, since the proposed amendment has yet been nowhere adopted, reinterpretation is needed in the interim. But, as will presently appear, Section 58—the provision of the Act first, and most often since, appealed to—merely limits the doctrine of the *Cellers* and *Vanderford* cases to the situation of an indorsee who is a holder in due course, which is still a far cry from restoring the rule of *Pooley v. Harradine*; and Section 119(4)—later appealed to—may do no more. Hence, an interpretation or interpretations of the Act not yet accepted must be pressed upon the courts and, even with that, amendment and reinterpretation in mutual aid of each other must be urged.

LATER DEVELOPMENT UNDER THE NEGOTIABLE INSTRUMENTS
LAW—SO-CALLED MINORITY RULE—SECTION 58

The first dissent from the denial of the surety's discharge was announced in 1908 by the Iowa court, in *Fullerton Lumber Co. v. Snouffer*.⁹⁵ Gaining acceptance only slowly at first, the *Fullerton* case possibly might now be found to represent the "majority" trend under the Negotiable Instruments Law.⁹⁶ Admitting that Sections 192, 119 and 120 precluded the discharge of accommodation parties primarily liable as against holders in due course, the Iowa court held that, since the "entire scope and purpose of the act, so far, at least, as it affects the question before us, is to fix the rights of holders in due course," by virtue of Section 58 "said act is not applicable" at all where the question arises between the surety party and the original payee, or other holder not in any respect a holder in due course.⁹⁷ So stated, this appeal to Section 58 can be met all too easily:—the Negotiable Instruments Law applies to instruments that are negotiable in form; the fact that an instrument negotiable in form is not negotiated by the payee leaves it nonetheless subject to the Negotiable Instruments Law; and Sections 192, 119 and 120 are not restricted in terms or in their judicial interpretation to situations involving holders in due course.⁹⁸

More aptly stated,⁹⁹ decisions applying Section 58 may be said to view the status of suretyship, coupled with a knowing interference therewith,

95. 139 Iowa 176, 117 N. W. 50 (1908).

96. See successive annotations in Notes (1927) 48 A. L. R. 715, 725; (1930) 65 A. L. R. 1425, 1426; (1937) 108 A. L. R. 1088, 1092. It is referred to as "the modern trend and majority interpretation of the Negotiable Instruments Act" in *State Nat. Bank v. Thompson*, 277 Ky. 527, 532, 126 S. W. (2d) 412, 415 (1939).

97. *Fullerton Lumber Co. v. Snouffer*, 139 Iowa 176, 117 N. W. 50 (1908).

98. *First State Bank v. Williams*, 164 Ky. 143, 175 S. W. 10 (1915); *Sloan v. Gates*, 166 Tenn. 446, 62 S. W. (2d) 52 (1933).

99. See, e.g., *Newkirk v. Hays*, 220 Mo. App. 514, 275 S. W. 964 (1925); *Hardin Trust Co. v. Wollard*, 119 Neb. 307, 228 N. W. 866 (1930); *Case Threshing Mach. Co. v. Howth*, 116 Tex. 434, 293 S. W. 800 (1927).

as a defense forecloseable by negotiation. In this view (although this is not recognized in the cases) the discharge should be available not merely against payees, or holders not otherwise holders in due course, but against holders who, although they are in all other respects holders in due course, have notice of the accommodation when they take the instrument, as in the very early case of *Laxton v. Peat*.

One answer to this view of the effect of Section 58, made in cases denying the discharge under Sections 192, 119 and 120, is that Section 29 cuts down the scope of Section 58 as respects defenses available to accommodation parties.¹⁰⁰ Another answer is that the court in the *Fullerton* case was able to discharge the accommodation party under Section 58 because Iowa did not then recognize that a payee may be a holder in due course, whereas the better view is that he may.¹⁰¹ If the refutation of this view of the effect of Section 58 depended on these contentions alone, it could be successfully withstood, for they may be given short shrift indeed. The first argument may be refuted by stating that Section 29 does not deprive an accommodation party of defenses other than the mere want of consideration for the instrument running directly to him;¹⁰² that mere knowledge of accommodation, not followed by an interference with that status, has never been thought to be the basis for a surety's discharge; that some defenses, despite the unhappy phrasing of Section 29, are available to an accommodation party that are peculiar to him;¹⁰³ and that Section 29, moreover, by its reference to "accommodation parties," includes within its proper meaning accommodation parties secondarily liable whose discharge for release or extension of time is expressly provided for in Section 120(5) and (6). As to the second view, while a payee may be a holder in due course, the circumstances under which he may be so are not necessarily, or even usually, those surrounding the giving of credit to one person on the instrument of another;¹⁰⁴ nor did anything appear in the cases where this refutation of the *Fullerton* case was attempted to indicate circumstances under which the payees therein involved would be holders in due course within the meaning of the rule that they may occupy that favored position in a proper case. A better criticism of the cases allowing the discharge under Section 58 would have been that, if the surety's discharge is a defense within the meaning of that Section, the protection of holders in due course against its interposition would be sufficiently assured under

100. *Vernon Center State Bank v. Mangelsen*, 166 Minn. 472, 208 N. W. 186 (1926); *Merchants' Nat. Bank v. Smith*, 59 Mont. 280, 196 Pac. 523 (1921).

101. *Atlantic Life Ins. Co. v. Carter*, 165 Tenn. 628, 57 S. W. (2d) 449 (1933); see cases cited *supra* note 100.

102. Note (1935) 95 A. L. R. 964, 978.

103. *Id.* at 980.

104. Feezer, *May the Payee of a Negotiable Instrument Be a Holder in Due Course?* (1925) 9 MINN. L. REV. 101.

the general provisions of Section 57 without any need to call in Sections 192, 119 and 120 to protect holders in due course in this single instance.

But, in stating the real objections to this interpretation of Section 58 as a rebirth of the rule of *Laxton v. Pcat*, it must be emphasized that the surety's equity, entitling him to be discharged, is not a defense within the meaning of that Section. To allow the discharge under Section 58 is to confuse the different qualities of a defense which is available to the maker as a surety against the actor, and a defense which is available to the maker as a party to the instrument, against one not a holder in due course, not himself the actor, if it was available against a party prior to such holder. Hence, the real objections to appealing to Section 58 are that it greatly limits the scope of the rule allowing the discharge and yet has created the impression in many quarters that a return to the prior rule is being accomplished without need for further reinterpretation, or amendment, or both.¹⁰⁵

LATER DEVELOPMENT UNDER THE NEGOTIABLE INSTRUMENTS LAW — SECTION 119(4)

In the search for authority for the discharge, much consideration has been given to Section 119(4). As early as 1911 Professor Brannan urged the Section as the basis for the accommodation maker's discharge,¹⁰⁶ at least alternatively to Section 196. Professor Beutel, an eminent authority, finds the discharge expressly provided for in Section 119(4), although with a curious notion of its interrelation with Sections 58 and 196 in this respect.¹⁰⁷ Other writers, too, have approved Section 119(4) as the basis for the discharge.¹⁰⁸ Since this ground for allowing the discharge has recently been gaining some favor in the courts,¹⁰⁹ it may be well to state briefly the logical inapplicability of the Section.

105. See Roberts, *Defenses of an Accommodation Maker* (1938) 23 IOWA L. REV. 335; Ousley, *Extension of Time for Payment as Releasing Sureties on Note in Kentucky* (1934) 22 KY. L. J. 371; see cases cited *supra* note 99.

106. BRANNAN'S NEGOTIABLE INSTRUMENTS LAW (2d ed. 1911) 117.

107. BRANNAN'S NEGOTIABLE INSTRUMENTS LAW (6th ed. 1938) 972-973.

108. Raymond, *Suretyship at "Law Merchant"* (1916) 30 HARV. L. REV. 141; Greeley, *The Uniform Negotiable Instruments Law in the Light of Recent Criticism* (1915) 10 ILL. L. REV. 265; see *supra* note 105.

109. *Citizens' State Bank v. Rosenwald*, 63 S. D. 50, 256 N. W. 264 (1934) is probably the only case squarely in point. North Dakota has allowed the discharge because of surrender of collateral under § 119(4). *Scandinavian Amer. Bank v. Westby*, 41 N. D. 276, 172 N. W. 665 (1918); *State Bank v. Edwards*, 45 N. D. 341, 177 N. W. 677 (1920). This does not necessarily imply that the North Dakota court would allow discharge as well for release or extension of time, for Ohio has allowed the discharge because of surrender of collateral under § 119(4) and impliedly restricted its application to that ground.

The most obvious objection is that Section 119, including subsection 4, relates to the discharge of instruments, not to the discharge of parties as such, and that the discharge of a surety party, even if effected by "any other act which will discharge a simple contract for the payment of money," will not discharge the instrument where the accommodated debtor is a party either primarily or secondarily liable, as he usually is, and where the "act" is an extension rather than a release.¹¹⁰ To say, as has been said, that the extension of time or release discharges the instrument as far as the surety party primarily liable is concerned, is to evade the question.¹¹¹ Again, to say that "any other act which will discharge a simple contract for the payment of money" will discharge a surety assumes the very question to be decided: whether an act which would discharge a surety before the passage of the Negotiable Instruments Law discharges him under the statute.¹¹² This question-begging characteristic of Section 119(4) was early pointed out.¹¹³

These objections aside, there is a somewhat more practical objection to the use of Section 119(4) as the basis for discharge. To come even remotely within the language of Section 119(4), the discharge must result from the holder's breach of an agreement to treat the accommodation maker as surety—a fact which is dimly recognized in the cases applying Section 119(4) and apparently fully realized by Professor Beutel.¹¹⁴ Breach of a contract to treat the acceptor as surety was not the rationale of *Pooley v. Harradine* but of *Fentum v. Pocock* and *Manley v. Boycot*, but it is a conceivable basis for the discharge. If it is accepted, however, the scope of the discharge may be even more restricted than apparently is conceded by Professor Beutel,¹¹⁵ who sees the difficulty in spelling out such an agreement by an indorsee who takes the instrument without knowledge of its accommodation character. Even if the indorsee knows of the suretyship when he takes the instrument, the

Goodman v. Goodman, 127 Ohio St. 223, 187 N. E. 777 (1933). Discharge of the maker of a mortgage note has been allowed under § 119(4) because of an extension of time to his grantee of the mortgaged premises. *Industrial Trust Co. v. Goldman*, 59 R. I. 11, 193 Atl. 852 (1937) (decision expressly restricted to particular situation).

110. This was recognized and the appeal to § 119(4) rejected in *Case Threshing Mach. Co. v. Bridger*, 133 La. 754, 63 So. 319 (1913) (allowing discharge under civil code provisions and, perhaps, § 196); *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679 (1912); *Richards v. Market Exch. Bank Co.*, 81 Ohio St. 348, 90 N. E. 1000 (1910); *Wolstenholme v. Smith*, 34 Utah 300, 97 Pac. 329 (1908). All these cases denied the discharge.

111. But this was so stated in *Scandinavian Amer. Bank v. Westby*, 41 N. D. 276, 172 N. W. 665 (1918), approved in *Smith v. Blackford*, 56 S. D. 360, 228 N. W. 466 (1929) (involving discharge of maker of mortgage note).

112. *Wolstenholme v. Smith*, 34 Utah 300, 97 Pac. 329 (1908).

113. McKeehan, *The Negotiable Instruments Law* (1902) 50 AM. L. REG. (N.S.) 499.

114. BRANNAN'S NEGOTIABLE INSTRUMENTS LAW (6th ed. 1938) 973-974.

115. *Id.* at 974.

parol evidence rule seems to stand in the way of proof of the agreement. Indeed, unless the accommodation maker adds appropriately descriptive words to his signature, or the instrument's terms otherwise expose an ambiguity with respect to his position (as conceivably where he is co-maker), it seems impossible to prove the existence of the agreement to treat the maker as surety even as against an original payee. This interpretation seems so vulnerable that it is unlikely that it will move courts already denying the discharge because of Sections 192, 119 and 120 to change their positions, except perhaps to obviate such manifest absurdities as the *Cellers* and *Lenoir* decisions.

Of course, if the courts take the attitude, in effect, that the contract to treat the accommodation maker as surety is implied by law and not implied in fact, this is tantamount to the rationale of *Pooley v. Harradine*, merely expressed differently and more laboriously. This is, indeed, equivalent to saying that Section 119(4) means that any act which will discharge a party at common law will do so under the statute. And one hesitates to impart to a Section, criticized for meaning the wrong thing and again as meaning nothing,¹¹⁶ the meaning of "everything else unprovided for," — especially when Section 196 is as readily available for that express purpose. But should the courts let themselves be persuaded to take this view of Section 119(4),¹¹⁷ one will scarcely look a gift horse in the mouth when combating interpretations of the statute based on *Cellers v. Meachem* and *Vanderford v. Farmers' & Mechanics' National Bank*.

A REINTERPRETATION OF SECTION 120

Another argument favoring the discharge has been based upon the construction of Section 120. There is some reason to believe that this Section was not in fact intended to abrogate the discharge of accommodation makers and acceptors as sureties, for it can with a little difficulty itself be reinterpreted as allowing their discharge. Because of the definition in Section 192 of the term "person secondarily liable," the use of the term in the introductory sentence of Section 120 has been made the basis for excluding parties primarily liable from the operation of subsections 120(5) and (6), which provide for discharge because of release or extension of time. Yet, although subsections 1 to 4, relating to grounds of discharge other than those based on principles of suretyship, are governed by the same introductory statement, their effect is not

116. McKeehan, *The Negotiable Instruments Law* (1902) 50 AM. L. REG. (N.S.) 499 (with respect to discharge of the instrument).

117. Does the discharge of the maker of a mortgage note because of extension of time to the grantee of the mortgaged premises require this view of § 119(4)? See note 109 *supra*. The special question of a surety's discharge in this circumstance will be the subject of a subsequent article.

denied to parties primarily liable. And, although it may be said that this result can be arrived at by reference to other provisions of the Act,¹¹⁸ it is not without significance that suggested amendments to Section 120 substitute the term "a party to a negotiable instrument" for the term "a person secondarily liable."¹¹⁹

If such confusion in terminology exists throughout Section 120, it does not seem unreasonable to suppose that the draftsmen were confusing the negotiable instruments and suretyship senses in which "secondary party," or "secondary liability," may be used.¹²⁰ In any event, if the statutory term "person secondarily liable" is read, in connection with subsections (5) and (6), in the suretyship sense of "secondary party," it is "not without interest to note that . . . much if not all difficulty of interpretation is at once eliminated, and familiar Common-Law principles of suretyship stand out in fairly clear perspective."¹²¹

Nor would this interpretation of "person secondarily liable" in Section 120 necessarily conflict with the definition of parties given in Section 192. Not all the parties concerned with negotiable paper and referred to in the Negotiable Instruments Law are defined in Section 192. Section 29 contains its own definition of accommodation parties, whose position on the paper would otherwise bring them within the definition of Section 192 but who are referred to and accorded separate treatment as accommodation parties in other sections.¹²² Moreover, the term "principal debtor," a suretyship and not a negotiable instruments term, is used several times throughout the statute;¹²³ and, significantly, that term, and not "party primarily liable," is used in Section 120(5) in contradistinction to "person secondarily liable." Thus the definition of parties in Section 192 might be said to relate only to the liability of parties "on the instrument" and not at all to a status outside the instrument, derived from circumstances known to the holder but neither appearing on the instrument nor affecting the liability thereon.

The suggested construction, while strained, involves little more in the way of linguistic gymnastics than is needed to interpret other provisions of the Negotiable Instruments Law in order to reach desirable results consonant with the prior law but not available under the Act's literal wording.¹²⁴ Indeed, courts have found it necessary to depart from the

118. NEGOTIABLE INSTRUMENTS LAW §§ 120(1), 123, 70, 87, 119(4).

119. See notes 89 and 93 *supra*.

120. As to early and recurring confusion of the ideas of secondary and accessorial, or collateral, liability, see 2 HARE & WALLACE, AM. L. CAS. (5th ed. 1871) 431. For a clarification of these troublesome terms, see Arnold, *Primary and Secondary Obligations* (1925) 74 U. OF PA. L. REV. 36.

121. BIGELOW, BILLS, NOTES, AND CHECKS (3d ed. 1928) 497, n. 2.

122. NEGOTIABLE INSTRUMENTS LAW §§ 64(3), 80, 114(3), 115(3), 121(2).

123. NEGOTIABLE INSTRUMENTS LAW §§ 87, 119.

124. For a single example, see *Mueller v. Jagerson Fuel Co.*, 203 Wis. 453, 233 N. W. 633 (1930) (construing § 119(5)).

literal wording of Section 120 itself for other purposes;¹²⁵ and "approved" constructions of Sections 58 and 119(4) on this problem are no less strained and fall short of fully re-establishing the prior rule. But this interpretation of Section 120 has after all been disavowed by its draftsmen;¹²⁶ the use of the term "principal debtor" in Section 120(5) has been explained as merely forestalling the absurd result of otherwise having the "release of the 'party primarily liable' (e.g., accommodation maker or acceptor)" effect the discharge of "*the accommodated indorser, the ultimate debtor*";¹²⁷ and this construction has found no support in the cases and virtually none from the textwriters.¹²⁸ While proposed amendments to the Act would restore the rule of *Pooley v. Harradine* by giving Section 120 the very meaning suggested,¹²⁹ until such amendments are adopted, restoration of the rule of *Pooley v. Harradine*, which cannot be accomplished under Section 58 or as certainly under Section 119(4), may be far more readily accomplished under Section 196 than under Section 120 as now worded.

THE WAY TO SECTION 196

If the draftsmen of the Negotiable Instruments Law intended to exclude the discharge of accommodation parties primarily liable, their phrasing of Section 120 did not succeed in doing so in express terms. To achieve that interpretation the *Cellers, Vanderford*, and succeeding cases resorted to an implication from the juxtaposition of Sections 119 and 120 and to the use of the maxim *expressio unius est exclusio alterius*. Another canon of construction, "that statutes in derogation of the common law are to be narrowly construed," would have been more appropriate in view of the state of the prior law and the propriety of a surety's discharge. An interpretation of these Sections, which seems as reasonable as the other, could be expressed thus: Section 119 relates to the discharge of instruments and not to the discharge of parties primarily liable; its juxtaposition to Section 120 therefore has no necessary significance here. Section 120 relates to the discharge as sureties of parties secondarily liable. The discharge as sureties of parties primarily liable is nowhere expressly provided for; but neither is it anywhere expressly denied. Theirs is, therefore, an omitted case and governed by the prior law under the very language of Section 196, particularly since statutes in derogation of the common law are to be narrowly construed. This interpretation

125. In regard to NEGOTIABLE INSTRUMENTS LAW § 120(3), see BRANNAN'S NEGOTIABLE INSTRUMENTS LAW (6th ed. 1938) 990 *et seq.*

126. See p. 396 *supra*.

127. BIGELOW, BILLS, NOTES, AND CHECKS (3d ed. 1928) 500.

128. Street, *Effect of Negotiable Instruments Law on Liability of Surety* (1907) 11 LAW NOTES 105; see BIGELOW, BILLS, NOTES, AND CHECKS (3d ed. 1928) 497, n. 2.

129. See notes 89 and 93 *supra*.

was early suggested by Professor Brannan,¹³⁰ alternatively to the use of Section 119(4), and approved by other writers.¹³¹ Thus far, however, except for the discharge of the maker of a mortgage note because of an extension to the grantee of the mortgaged premises¹³² and possibly the discharge of an accommodation maker because of the surrender or impairment of collateral¹³³—cases which most frequently rest on reasoning restricting the application of Section 196 to these specific situations¹³⁴—this interpretation of the statute has little support in the cases.¹³⁵ There also are cases which allow the discharge of accommodation makers because of release or extension of time without citing either the Act or cases decided under the Act, which might be interpreted as applying Section 196 *sub silentio*.¹³⁶

Yet this interpretation might well be adopted by a court, whose attention was also called to the history of *Fentum v. Pocock* and the reason behind *Pooley v. Harradine*, where such a court would be unable to bring itself to the suggested reinterpretation of Section 120 or would balk at the strained constructions to be made and the theoretical objections to be met in allowing the discharge under Sections 58 or 119(4). More important, the appeal to Section 196 would allow the discharge as freely as under the prior law and not in the limited scope required by Section 58, and possibly by Section 119(4). Certainly, unless or until Section 120 is amended as now proposed, the courts should be directed in this regard to Section 196, via *Pooley v. Harradine* and *Bailey v. Edwards*.

SUMMARY AND CONCLUSION

There is no reason why latent sureties on negotiable instruments should not, like ordinary sureties, be discharged because of release or extension of time. Since the discharge results from the holder's own act only after

130. BRANNAN'S NEGOTIABLE INSTRUMENTS LAW (2d ed. 1911) 117.

131. Street, *Effect of the Negotiable Instruments Law on Liability of the Surety* (1907) 11 LAW NOTES 105; see works cited *supra* notes 105 and 108. Not all of these writers see that it is necessary to turn wholly away from § 119(4) and, certainly, away from § 58 if the discharge is to be allowed in its widest scope.

132. Isaacs v. Van Hoose, 171 La. 676, 131 So. 845 (1930); Wilkinson v. Adams, 179 La. 630, 154 So. 630 (1934). See also Smith v. Davis, 67 Colo. 128, 186 Pac. 519 (1920); Mutual Benefit Life Ins. Co. v. Lindley, 97 Ind. App. 575, 183 N. E. 127 (1932).

133. Rommel Bros. v. Clark, 255 Ky. 554, 74 S. W. (2d) 933 (1934) (may rest on § 58).

134. These will be the subject of a subsequent article.

135. Case Threshing Mach. Co. v. Bridger, 133 La. 754, 63 So. 319 (1913) (may depend in part on LA. CIV. CODE (Dart, 1932), Art. 2203, expressly providing for discharge of co-maker because of release, etc.); Hederman v. Cox, 193 So. 19 (Miss. 1940) (though § 196 not cited, expressly rejects early N. I. L. majority view; return to the uncoded law suggested by citation of early cases).

136. See, e.g., Ray v. Summerlin, 211 Ala. 334, 100 So. 482 (1924); Finch v. Provident Mut. Life Ins. Co., 55 Ga. App. 518, 190 S. E. 675 (1937).

he knows of the suretyship and not from his mere knowledge of the suretyship or from any act transpiring between the surety and a prior holder, the discharge would not interfere with the currency of commercial paper. Hence the discharge should be available even against indorsees in all respects holders in due course on taking the instrument. All this was so well established before the adoption of the Negotiable Instruments Law that there was hardly a dissentient from the rule allowing the discharge. Yet, first interpretations under the statute found the Act to abrogate the rule entirely, and later interpretations fall short of re-establishing the prior rule.

Since it does not clearly appear that the Act was intended to abrogate the rule permitting discharge or even to modify its scope, the result under the statute may have been merely the consequence of ineptitude in drafting the Act and in interpreting its provisions. Added to this, there may have been a certain judicial hostility toward allowing the surety's total discharge because of release or extension of time without allegation and proof of actual damage. Further, the historical accident of the first interpretations of the Negotiable Instruments Law in this connection, coupled with the rigidifying effect of codification and the plea for a uniform interpretation of a uniform statute, played a part in establishing the early rule under the Act; and a similar snow-ball-rolling-down-hill judicial process in the later attempt to restore the prior rule led to an accumulation of cases which restricted the scope of the discharge in their attempts to restore it.

The essential justice of the prior rule is evidenced somewhat by the rapid rise of the "minority" rule under the statute in the face of the plea for uniform interpretation and by the official proposal of an amendment to restore the prior rule in its widest scope. But amendment is all too slow in coming, and the so-called minority interpretations unnecessarily limit the scope of a surety's discharge. Yet the prior rule can be restored, as it need never have been abolished or modified, by a reinterpretation of Section 120 or, more certainly, by an appeal to Section 196.